

December 20, 2006

Civil Division-Kent County (739-7641)

Mr. Robert D. Eckstine
20827 Shell Station Road
Frankfort, DE 19945

Re: **Freedom of Information Act Complaint
Against Source Water Protection Citizen
and Technical Advisory Committee**

Dear Mr. Eckstine:

Our Office received your complaint on October 27, 2006 alleging that a committee established by the Sussex County Council, the Source Water Protection Citizen and Technical Advisory Committee ("the Committee"), violated the open meeting requirements of the Freedom of Information Act, 29 *Del. C.* Ch. 100 ("FOIA"), by: (1) meeting twice (on August 30 and October 11, 2006) without posting an agenda seven days in advance to notify the public of the matters of public business to be discussed; and (2) not preparing minutes of those meetings.

By letter dated October 27, 2006, we asked the Committee to respond to your complaint by November 6, 2006. By letter dated November 13, 2006, the Committee asked for ten additional days to respond to allow the Committee's counsel "sufficient time to receive the draft minutes of the November 8 meeting so that we will know which of the actions complained about by Mr. Eckstine were properly re-approved by the Committee on November 8, 2006, as reflected in the draft minutes

of that meeting." We granted the Committee's request for a ten-day extension of time until November 27, 2006, but did not receive the Committee's response until December 8, 2006.

The Committee acknowledges that it "falls within the definition of a public body and is required to post public agendas 7 days in advance for the meetings of the Committee." The Committee also acknowledges that it "did not post agendas for the meetings held on August 30 and October 11, 2006." The Committee provided us with copies of the minutes for each of those meetings so your claim that the Committee did not prepare minutes as required by FOIA is unfounded.

According to the Committee, though it "failed to post agendas for the meetings held on August 30 and October 11, 2006, it should be noted that the Committee did post an agenda for its third meeting which was held on November 8, 2006. . . . At that meeting, the Committee approved the minutes of the August 30 meeting. By doing so, the Committee confirmed the election of the chairperson for the Committee and re-approved any actions taken at the first meeting."

The minutes of the November 8, 2006 Committee meeting show that the Committee approved the minutes of the August 30, 2006 meeting. The minutes of the December 5, 2006 meeting¹ show that the Committee approved the minutes of the October 11, 2006 meeting. The Committee contends that by subsequently approving the minutes of the August 30 and October 11, 2006 meetings "the actions taken at those meetings essentially re-approved the actions taken at the first two meetings. . . Overall, the County believes that proper remediation has been made for the

¹ The Committee provide us with the minutes of the December 5, 2006 meeting in draft form because the Committee will not have the opportunity to approve them until its next meeting in January 2007.

failure to post agendas for the first 2 meetings."

RELEVANT STATUTES

FOIA requires that "[e]very meeting of all public bodies shall be open to the public except those closed" for executive session as authorized by statute. 29 *Del. C.* §10004(a).

FOIA requires public bodies to "give public notice of their regular meetings and of their intent to hold an executive session closed to the public at least 7 days in advance thereof. The notice shall include the agenda," *Id.* §10004(e)(2).

LEGAL ANALYSIS

The Sussex County Council established the Committee to draft a Source Water Protection Ordinance with the help of a private consulting firm, Duffield Associates, and County staff.

The Committee, a representative of the consulting firm (Mr. Nicholas DiPasquale), and County staff members first met on August 30, 2006. The minutes of that meeting reflect that the group discussed several changes to the draft ordinance prepared by the consultant and the schedule for completing work on the ordinance by March 30, 2007. The minutes also reflect that the Committee elected Mr. Burt Messick as its Chair.

The Committee next met on October 11, 2006. The minutes of that meeting show that "[i]t was agreed by consensus that the committee would continue its deliberations utilizing the draft document prepared by Mr. DiPasquale of Duffield Associates." There followed ten motions and votes to amend the language of the draft ordinance.

For its third meeting, scheduled for November 8, 2006, the Committee posted an agenda

seven days in advance (on November 1, 2006) as required by FOIA. The agenda listed for discussion: "1. Discussion and re-approval of actions approved at the August 30 and October 11, 2006 meetings"; and "2. Continue review of changes to a draft ordinance for Sussex County Council's review that will become part of the 2007 review and update of the Comprehensive Use Plan."

The minutes of the November 8, 2006 meeting show that the Committee voted to approve (with minor corrections) the minutes of the August 30, 2006 meeting. The Committee voted to table approval of the minutes of the October 11, 2006 meeting because of questions about their accuracy. The minutes of the November 8, 2006 meeting show that the Committee then went through the draft ordinance paragraph by paragraph with motions and votes to add or delete language.

The next meeting of the Committee was scheduled for December 5, 2006. The Committee posted notice of that meeting on November 22, 2006 seven days in advance as required by FOIA. The agenda listed: "1. Review of meeting minutes of October 11 and November 8, 2006"; "2. Discussion and re-approval of actions approved at the October 11 and November 8, 2006 meetings"; and "3. Continue review of changes to a draft ordinance for Sussex County Council's review that shall become part of the 2007 review and update of the Comprehensive Land Use Plan."

The minutes of the December 5, 2006 meeting show that the Committee voted to approve the minutes of the October 11, 2006 meeting. Then followed a series of motions to make further changes to the draft Source Water Protection Ordinance.

At the August 30, 2006 meeting, the Committee stated its intention to present "its finished work" on the Ordinance "to the County Council by December 2006 so that the draft ordinance that it produces could be included with the materials to go before the public at five scheduled public

hearings in January of 2007."

We determine that the Committee violated the open meeting requirements of FOIA by meeting on August 30 and October 11, 2006 to discuss a matters of public business relating to the draft Source Water Protection Ordinance without giving notice to the public and posting an agenda at least seven days in advance.

The Committee contends that no remediation should be required for these violations because it ratified the actions taken at those two meetings by approving the minutes of those meetings on November 8 and December 5, 2006. We disagree. As an initial matter, the notice and agenda for the November 8, 2006 meeting only mentioned "Discussion and re-approval of actions approved at the August 30 and October 11, 2006 meetings." We do not believe that was sufficient to give the public reasonable notice of the matters of public business to be discussed since neither of those two earlier meetings had been noticed to the public as required by FOIA.

On several occasions, our Office has concluded that remediation was not necessary because the public body cured a violation of the open meeting law by ratifying the action at a later meeting properly noticed to the public. *See, e.g., Att'y Gen. Op.* 01-IB02 (Jan. 30, 2001) ("We find that the Town cured that defect by ratifying the action taken on December 23, 2003 at the meeting of the Town Council on January 4, 2001."); *Att'y Gen. Op.* 05-IB21 (Aug. 1, 2005) ("the School District remediated the agenda violation for the June 13, 2005 special meeting by re-noticing the matters of public business approved at the June 13, 2005 meeting for discussion and approval at meetings on June 21 and July 5, 2005, both of which meetings were noticed to the public in accordance with FOIA.").

By "ratify," however, we mean more than the cursory approval of prior actions taken in

violation of FOIA.

In *Neese v. Paris Special School District*, 813 S.W.2d 432 (Tenn. App. 1990), the school board violated the open meeting law by meeting privately to discuss a school clustering plan. The board formally adopted the clustering plan at a later meeting properly noticed to the public "with thorough discussion and public involvement." 813 S.W.2d at 436. The Tennessee Court of Appeals observed that it was not "the legislative intent to allow such a body to ratify a decision in a subsequent meeting by a perfunctory crystallization of its earlier action." *Id.* But "the purpose of the act is satisfied if the ultimate decision is made in accordance with the Public Meetings Act, and if it is a new and substantial reconsideration of the issues involved, in which the public is afforded ample opportunity to know the facts and to be heard with reference to the matters at issue." *Id.* (citing *Alaska Community Colleges' Federation of Teachers v. University of Alaska*, 677 P.2d 886, 890 (Alaska 1984) ("ratification should be effective only after a true reconsideration"; court must determine "whether the validation meeting functioned as a true de novo consideration of the defective action"))).

The *Neese* court held there was substantial reconsideration of the cluster plan because the school board heard "presentations from concerned parents" and conducted "a question and answer session" which "lasted approximately three hours." 813 S.W.2d at 436, 437. In contrast, in *Souder v. Health Partners, Inc.*, 997 S.W.2d 140 (Tenn. App. 1998), the Tennessee Court of Appeals held that ratification of a contract by a hospital district "was merely a perfunctory rubber stamp thereby failing to cure the previous violations of the [open meeting law]." 897 S.W.2d at 150. "[T]he adopted resolution of the Board of Trustees merely states that all [previous] actions are ratified and confirmed." *Id.* at 151. There was "no evidence of any discussion on the matter" and the board

"failed to give 'new and substantial reconsideration' of the actions" previously taken in violation of the open meeting law. *Id.* (quoting *Neese, supra*).

We do not believe that the Committee's approval of the minutes of the August 30 and October 11, 2006 meetings was new and substantial reconsideration of actions on matters of public business taken at those two meetings. Approval of the minutes is a ministerial act to correct any omissions or inaccuracies and make sure the minutes contain the minimum information required by FOIA. *See 29 Del. C. §10004(f)* ("record of members present and a record, by individual members . . . of each vote taken and action agreed upon").

The minutes of the November 8, 2006 meeting show that the Committee corrected the draft minutes of the August 30, 2006 meeting to add one name to the list of members present and to include the names of the members who made and seconded motions. One member then "motioned to approve the August 30th minutes as amended. Motion was seconded and carried." The minutes of the December 5, 2006 meeting show that the Committee voted to "approve the October 11, 2006" draft minutes after adding a "list of members present." In neither situation was there any substantive discussion of the actions taken by the Committee at those earlier meetings (changes to the draft Source Water Protection Ordinance, and election of a Committee Chair).

We determine that the Committee's subsequent approval of the minutes of the August 30 and October 11, 2006 meetings was not "a true de novo consideration of the defective action." *Alaska Community Colleges' Federation of Teachers*, 677 P.2d at 890.

As remediation, we direct the Committee to notice on the agenda for its next meeting in January 2007 the minutes of the August 30 and October 11, 2006 minutes. The Committee should attach copies of the minutes of those two meetings to the agenda wherever posted, and have

sufficient copies available to hand out to members of the public who attend the meeting in January 2007.

While it may be time-consuming for the Committee to reconstruct, motion by motion, the legislative drafting which occurred at the August 30 and October 11, 2006 meetings, one alternative would be for the Committee to provide a period of public comment – like a question and answer format – about the minutes of those two meetings.² After a period of public comment, the Commission could then vote to ratify all motions made and carried at those two meetings regarding changes to the draft Ordinance. The Commission, however, should separately ratify the election of Mr. Messick as Chair.

CONCLUSION

For the foregoing reasons, we determine that the Committee violated FOIA by meeting on August 30 and October 11, 2006 without posting an agenda seven days in advance of the meetings to notify the public of the matters of public business to be discussed.

As remediation, we direct the Committee to include on the agenda for its next public meeting in January 2007 the minutes of the August 30 and October 11, 2006 meetings. The Committee should attach copies of those minutes to the agenda wherever posted, and have sufficient copies available to hand out to the public at the January 2007 meeting. In lieu of discussing and voting on every change to the Source Water Protection Ordinance, the Committee could allow for a period of

² As a general rule, FOIA "does not require public participation, only that citizens have timely notice of public meetings so that they can monitor and observe their elected officials discuss matters of public concern." *Att'y Gen. Op.* 03-IB06 (rev. Feb. 2003). In the context of remediation, however, we believe that a public body may elect to provide for public participation to help cure a violation of the open meeting law.

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public comment on the minutes of the August 20 and October 11, 2006 meetings, and then vote to ratify all of the legislative changes made at those two meetings.

Counsel for the Committee is directed to report back to our Office in writing within ten days after remediation is completed. The Committee is cautioned to strictly comply with the requirements of the open meeting laws in the future.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED:

Lawrence W. Lewis, Esquire
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cc: The Honorable Carl C. Danberg
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